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Supreme Court of the United States

OCTOBER TERM, 1933

NO. 669.

JOHN N. MINNICH, Petitioner,

v.

RUSSELL GARDNER et al., Intervening Creditors, and D. C. REILEY, Esq., Trustee of King Motor Co., Bankrupt.

BRIEF OF RUSSELL GARDNER ET AL., WAGE CLAIMANTS, RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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ARGUMENT.

Respondents deny that there is any foundation for petitioner's prayer that a writ of certiorari be granted, and deny that there is any real question of law in the case.

Petitioner's unsuccessful contention has been that he has a lien of $1,776.17 (Page 12 of petitioner's Brief) against a fund of money in the hands of the trustee in bankruptcy. The alleged lien is based upon two writs of execution issued by petitioner out of the Pennsylvania court approximately eighteen months before the bankruptcy, on which writs, at about the time they were

issued, levies were made on the personal property of the bankrupt in the bankrupt's place of business. Petitioner never proceeded to sale on his writs. Said fund in the hands of the trustee was realized in the bankruptcy proceeding from the trustee's sale of the aforesaid personal property of the bankrupt.

If we accurately interpret the printed Argument which the petitioner has filed here, his present theory is that the writ of certiorari should be granted because the decision of the Circuit Court of Appeals for the Third Circuit, in the case at bar, presents a conclusion different from those reached in three decisions in other Circuits, namely, *In re Schwab Printing Co.*, 59 F. (2d) 726; *In re Zeis*, 245 F. 737, and *In re Gulfport Furniture Co.*, 1 F. Supp. 489.

That theory of the petitioner, however, would not bear analysis. Necessarily, in reaching its conclusion in the case at bar, the Circuit Court of Appeals for the Third Circuit followed the Pennsylvania law with reference to executions. It should not have done otherwise. So much was conceded in the Circuit Court of Appeals by the petitioner herein; at page 9 of his printed Brief filed in the Circuit Court of Appeals, there appeared the following:

> "By decisions so well settled as not to require citation, the law of Pennsylvania will govern as to liens created under judgments and writs of its Courts."

An inspection of the three cases aforesaid, cited and relied upon by petitioner, shows that in each of them the Court—as did the Circuit Court of Appeals in the case at bar—simply applied the statutory or other rules of the particular State with reference to the validity

of executions, in reaching its determination as to whether the particular lien was or was not valid.

That the Circuit Court of Appeals in the case at bar reached its decision by applying, to the facts, a clearly established Pennsylvania rule, can be demonstrated easily.

In Pennsylvania, the Appellate Courts have been firmly committed to the principle that, where the rights of other creditors are in any way concerned, a presumption of fraud arises against an execution plaintiff who fails or refuses promptly to proceed to sale on his writ, although the presumption may be rebutted. Justice Thompson, in the Opinion (Record, Page 52) of the Circuit Court of Appeals in the case at bar, quoting from the Opinion of the Supreme Court of Pennsylvania, in *Platt-Barber Co. v. Groves,* 193 Pa. 475 (decided in 1899) said:

> " 'The rule is well established that an execution which is not put in the sheriff's hands with the bona fide intention of collecting the debt, but merely to be held as a security, or to prevent other creditors from coming upon the debtor's goods, is fraudulent as to them, and will be postponed to subsequent levies. And stay, or unusual delay of the proceedings, allowing the debtor to sell or otherwise to deal with the goods in contravention of the levy, and other acts of similar nature, give rise to a presumption of want of good faith: *Dorrance's Admr. v. Com.*, 13 Pa. 159; *Earl's Appeal,* 13 Pa. 483; *Freeburger's Appeal,* 40 Pa. 244.' "

Further, from the Opinion of Justice Thompson in the Circuit Court of Appeals, in the case at bar, page 53 of Record, we quote:

> "Under the facts, we reach the conclusion that the appellant, the lien claimant here, made his levy solely for the purpose of acquiring a lien and without a genuine intention of proceeding promptly for the collection of his debt. He postponed all action until such time as the debtor was obviously insolvent and within four months of the bankruptcy. He has not met the test of good faith and has therefore failed to establish liens upon the fund."

Petitioner herein has in effect admitted that for about eighteen months following the levies he allowed, the bankrupt's place of business to remain open and allowed the property levied upon to be sold or offered for sale in the usual course of business (Record, Page 31).

In other words, in rejecting the petitioner's alleged and fantastic lien, all that the Circuit Court of Appeals did in the case at bar was to apply, to the rather peculiar facts existing here, and recited in the Opinion of Justice Thompson, Page 52, Record, the well understood Pennsylvania principle relating to dilatory execution plaintiffs. And that principle—we may add—had been applied again so recently as 1929 by the Superior Court of Pennsylvania in *Raskin v. Nasow,* 97 Pa. Super. 281. That the rules in other States as to the strength of the lien of a dilatory execution plaintiff may be different than the Pennsylvania rule—and that seems to be the

real burden of petitioner's prayer here—is clearly beside the question.

By the provisions of Section 47-a (2) of the Bankruptcy Statute, as to this fund in his possession, derived from goods in his possession which he sold, the trustee in bankruptcy has the status of a lien creditor. We might add also that various Pennsylvania decisions which the petitioner in the case at bar has inserted in his printed Argument, and which relate to the status of a dilatory execution creditor where the rights of other creditors are not involved, can have no possible bearing on the issue here.

We respectfully submit, therefore, that the petition should be dismissed.

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